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## *Custom and Statute: A Brief History of Their Coexistence in Poland*

### Abstract

The present paper briefly surveys the developmental lines along which Polish customary and statutory legal systems have evolved. Emphasis is placed on the time period up until the Third Partition of Poland. Originally, Polish law formed a customary system. However, in the course of centuries, this system was partially modified by statutory law, the statutes being first the creation of the monarchy and later that of the parliament. Customary law, however, remained predominant due to the power of the Catholic Church, as well as Poles' reluctance to abide by Roman law. Between the thirteenth and fifteenth centuries, customary law began being compiled into various collections. At the same time, statutory law began to appear, for instance, in the form of royal privileges for the nobility, sometimes issued in consultation with a large body of the monarch's advisors assembled in so-called *colloquia*. The latter, as the proper place for the monarch to adopt statutory rules, laid the foundation for future parliamentary structures. Thus, customary and statutory law coexisted in Poland during this time period. Land law, on the other hand, was overwhelmingly customary in nature even in the fifteenth century. Then, in the sixteenth century, attempts were made to replace the custom with a codified land law system. The statute frequently performed a complementary role *vis-à-vis* the custom and supplemented principles contained therein. In some cases, however, the statutory law would contradict older practice and tradition, thereby introducing new norms. In the sixteenth century, when regular parliaments (Sejms) began to fully function, the old *ius ducale*, which once allowed the monarch to intervene in the substance of customary law, ceased to exist. Additionally, the nobility, who controlled Sejm activities, showed no real intention of intervening in the custom. Ultimately, during the mid-sixteenth century, the legislative nature of customary norms ceased to be questioned. Two old Polish institutions – life annuity between husband and wife and the securing of a loan by mortgage – exemplify the predominant role of the custom over the statute. This tendency is particularly evident in penal law, homicide being a prime example. Statutory law, on the other hand, was more successful in the area of procedure. However, it is possible to encounter the same tendency as in the aforementioned institutions of private and penal laws, an example being the old Polish possessory trial. The coexistence of the custom and the statute in the Polish legal system is supported by a long-lasting tradition, the role of the custom being not entirely eliminated even today.

**Key words:** custom, customary law, statute, privilege, statutory law, king, parliament, coexistence of custom and statute, domination of customary law, development of the statutory law system, inception of statutory law, private law, penal law, procedure

**Słowa kluczowe:** zwyczaj, prawo zwyczajowe, statut, przywilej, prawo stanowione, król, parlament, współistnienie zwyczaju i prawa stanowionego, dominacja prawa zwyczajowego, rozwój systemu prawa stanowionego, początek prawa stanowionego, prawo prywatne, prawo karne, postępowanie sądowe

## 1. Introduction

The present paper briefly surveys the developmental lines along which Polish customary and statutory legal systems have evolved. The paper focuses mostly on the time period between the tenth and eighteenth centuries (i.e. until the Third Partition of Poland), but it also makes some references to the role of customary and statutory law in recent times.

Polish law was originally customary in nature. The system, however, in the course of centuries, was partially modified by statutory law, the statutes being first the creation of the monarchy and later that of the parliament (or Sejm in Polish). This paper discusses the coexistence of the custom and statute and shows that the latter – at least until the end of the eighteenth century – hardly ever managed to adopt a dominant position *vis-à-vis* the former.

The discussion focuses mostly on land law, which was the area of law applicable to the particularly numerous Polish noble class. Apart from the land law, there were also other types of law applicable to social groups other than the nobles. Thus, the law of cities, the law of villages, and the Canon law applied to townsmen, peasants, and clergy respectively. The law binding in the cities was considerably influenced by German law, while the law applied by the village courts was often a mixture of land, Canon, and town legal systems. The discussion will concentrate on presenting a selection of mostly private institutions, as well as penal and procedural branches of land law in an attempt to demonstrate the overlap between customary and statutory laws.

## 2. The origin and development of Polish customary law and the systems that affected its evolution

Customary law and its description by eminent jurists played a predominant role in the Polish legal system between the tenth and the fifteenth centuries. Thus, it was custom that originally established the laws which governed the behavior of individuals. Additionally, there was a widespread conviction that the law was a part of the divine order. In other words, it was believed that men did not create the law; their business was only to implement it. This belief was strengthened with the adoption of Christianity in 966.<sup>1</sup>

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<sup>1</sup> W. Uruszczak, *Próba kodyfikacji prawa polskiego w pierwszej połowie XVI wieku*, Warszawa 1979, p. 11; A. Vetulani, *Z badań nad kulturą prawniczą w Polsce piastowskiej*, Wrocław–Warszawa–Kraków–Gdańsk 1976, pp. 166–168.

Christianity facilitated the reception of Canon law. Indeed, if customary law did not provide a sufficient solution for a given problem, lawyers could resort to the concepts offered by the Canon law system. After Poland's baptism, the arrival of educated clergy from other countries facilitated the deepening of the knowledge of this law system. Additionally, the number of native priests schooled in the Canon law system also grew. Necessary for the State apparatus, they occupied high posts in the State structure, thereby modifying the application of customary law with elements of the system that were close to their frame of mind. Over time, it was believed that the customary law owed its binding status not only to its long usage but also to its acceptance by the Church authority. In this way, the idea of *consuetudo approbata* came to being.

The penetration of the Polish legal system by the Canon law also facilitated the absorption of certain principles and ideas from Roman law, which had a lot in common with Canon law. One of the earliest chroniclers of Poland and the bishop of Cracow Wincenty Kadłubek quoted Roman law concepts in his writings while commenting on contemporary developments.<sup>2</sup>

In general, however, Roman law did not exert any larger influence upon Polish law. At the time, the monarch of Poland and his nobles held reservations about the ambitions of the German kings, who from 962 had declared themselves the rulers of the Holy Roman Empire and, consequently, the successors of Roman emperors. These kings believed that *Corpus Iuris Civilis* was a binding force in the entire territory that was subject to them. They also considered themselves superiors *vis-à-vis* monarchs who reigned in other European states. Throughout history, particularly during the end of the Middle Ages, national rulers no longer wanted to accept any idea which would infringe upon their status as sovereign monarchs. This was also true for the Polish kings. They were therefore suspicious of the Roman law for they believed that any show of reverence to the latter might pose a threat of submission of their country to the powerful neighboring empire.

However, returning to the question of *consuetudo approbata*, it can be said that in accepting a custom, what was important for the Church was not a long-lasting practice supporting the norm of customary law but the question of whether the latter was just and concordant with the Divine law (*consuetudo recte*). Canon law did not approve evil customs (*mala, prava consuetudo*), even if the latter were confirmed by a long-lasting tradition. The example set by the Church was also followed by secular rulers who thus thought it right to intervene with the customary law, for they believed it was their duty to eliminate evil customs.<sup>3</sup>

Another line of law that had some impact on the shaping of Polish customary law, which particularly applied to cities and villages, was German law. In the thirteenth century Poland experienced a remarkable depopulation caused by a Mongol invasion, and settlers from other countries, especially from Germany, began to flow into Polish cities and villages. While founding their own settlements in Poland, these individuals received the right to govern themselves with the system of law already applied in some German cities like Magdeburg and Lübeck. Thus, a part of Polish cities could be subject to the law

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<sup>2</sup> For further details on Wincenty Kadłubek and his works see: J. Sondel, *Ze studiów nad prawem rzymskim w Polsce piastowskiej*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego” 1978, nr 63, pp. 36–63.

<sup>3</sup> W. Uruszczak, *Próba...*, pp. 11–15.

of a neighboring country. If during the settling of disputes there emerged difficult legal issues, the adjudicating panels applied for solutions (which were called *ortyle* and had the nature of a precedent) in the courts of the German “mother-city” (e.g. Magdeburg) from which their system stemmed. However, in the fourteenth century the monarch successfully managed to centralize his power, and thereafter he considered this practice to be a challenge to Poland’s sovereignty. Thus, he formed a special Polish Court which adjudicated on the basis of German law as the appellate Court. This Court was established in the Wawel Royal Castle of Cracow and was fully competent to solve any difficult court issue applying to German law<sup>4</sup>. This gave rise to the specific Polish branch of the German customary law applied *vis-à-vis* townsmen and villagers.<sup>5</sup>

However, referring again to the question of how Polish customary law was being shaped in the Later Middle Ages, we must emphasize the role of monarch courts in that process. Although court-applied law was based on the old custom, the latter was not unquestioningly accepted in the royal courts of law. State doctrine emphasized that the ruler’s law, *ius ducale*, was of a supreme position *vis-à-vis* the custom. Hence, the ruler could occasionally modify the custom through the verdicts of his judges or by decrees of an administrative nature issued by his officers. Such correcting verdicts or enactments were considered exceptions to the rule which was otherwise binding. When the “correction” was repeatedly applied, it led to the formation of a new “custom”.<sup>6</sup>

Between the thirteenth and fifteenth century, similar to the Western countries, customary law began being compiled into various collections either through the initiative of the monarch himself or through that of private individuals. The oldest known compilation of Polish customary law is the thirteenth-century *Elbląg’s Book*.<sup>7</sup> Later, other compilations followed, such as the fifteenth-century *Constitutiones Lancienses*, the fourteenth-century *Customs of the Łęczycka land* (*Zwyczaje Ziemi Łęczyckiej*), the fifteenth-century *Judicial Articles* (*Artykuły Sądowe*), and the fifteenth-century *Consuetudines terrae Cracoviensis* (later incorporated into the so-called *Łaski’s Statute* of 1506). Another interesting compilation was *Processus iuris* (also in the so-called *Łaski’s Statute*).<sup>8</sup>

In the beginning the customs of various provinces varied considerably. Monarchs such as Ladislaus I the Elbow-High and Casimir the Great (who in the fourteenth century aspired to achieve a larger consolidation of the country into *Corona Regni Poloniae*) began the business of eliminating particularisms of the customary law.<sup>9</sup>

<sup>4</sup> O. Balzer, *Uwagi o prawie zwyczajowem i ustawniczem w Polsce*, „Kwartalnik Historyczny” (KH), 1888, vol. 2, p. 193.

<sup>5</sup> W.A. Maciejowski, *Historia prawodawstw słowiańskich*, Warszawa–Lipsk 1832, pp. 207–215.

<sup>6</sup> O. Balzer, *Uwagi...*, pp. 180–181.

<sup>7</sup> The name of this collection is derived from the name of the place of its discovery by the scholars. This book was examined by various Polish legal historians, e.g. M. Winawer, *Najdawniejsze prawo zwyczajowe polskie*, Warszawa, 1900; *Najstarszy zwód prawa polskiego*, eds. J. Matuszewski, J. Matuszewski, Łódź 1995.

<sup>8</sup> S. Kutrzeba, *Historia źródeł dawnego prawa polskiego*, vol. 1, Lwów–Warszawa–Kraków 1933, pp. 99–107.

<sup>9</sup> A. Vetulani, *Z badań...*, p. 173.

### 3. The inception of the statutory law in Poland

A particularly interesting branch of law in which the custom survived best was the land law. This law applied to the noble estate (*szlachta*). It governed the civil relationships between its members, specified their penal liabilities, defined crimes, and – in its constitutional component – established the extra-privileged status of the noble class. The land law was significant in that it referred to a considerable segment of the population since Poland and consequently the Polish-Lithuanian Commonwealth had the largest European proportion of nobles. Until the fall of the “Republic of the Two Nations”, the land law was really a law based on custom which later was only slightly modified through statutory influence. The latter was perhaps made most evident through the shaping of the constitutional, privileged status of the noble class and subsequently of the entire *szlachta* class.<sup>10</sup> These privileges were predecessors of the future statutes adopted by parliament members. When issuing these privileges, the king acted within his prerogative, thereby modifying the customarily accepted rights of the nobility and consequently enlarging their liberties. These privileges were exceptions to the generally binding custom. Throughout the Late Middle Ages, some of these privileges adopted a tint of statutory norms because on occasion of issuing them the monarch consulted a larger body of his advisors assembled at the so-called *colloquia*. The latter, as will be demonstrated in the following analysis, laid the foundations for future parliamentary structures.

Owing to the aforementioned privileges noblemen’s landed property could not be subject to taxation that exceeded a specified amount. The *Przywilej Koszycki* of 1374 (the Statute of Koszyce) thus guaranteed that if the king desired to impose higher taxes, he would have to obtain consent from the privileged class. Likewise, according to the *Czerwieńsk Statute* of 1422, the land owned by the nobles could not be confiscated without due process of law. A particularly significant concession was made by the king to the nobles of Jedlna and Cracow (1430–1433), in which he guaranteed the nobles *habeas corpus*. From that time on, an individual of noble status could not be arrested without due process of law. Immediate detention was possible only in a few drastic cases (like arson, highway robbery, etc.), and on such occasion the law required a speedy trial of the indicted individual to prevent him from being kept in prison without his guilt being proven.<sup>11</sup>

Remarkable privileges enjoyed by the noble class – particularly the fact that the monarch could not impose larger taxes or even summon *levy en masse*<sup>12</sup> without consent – forced rulers to slowly accept the concept of *wiece* (“assemblies”) or *colloquia*, which

<sup>10</sup> W. Uruszczak, *Próba...*, p. 18; O. Balzer, *Uwagi...*, pp. 181–182.

<sup>11</sup> The statute proclaimed, “Moreover, we promise and pledge that: for some impropriety, we will neither seize at once, nor order the seizure of, any propertied native individual; nor shall the same be punished, unless justly convicted through a criminal proceeding. As for jurisdiction and judges, an accused will be tried in the locale of his home, by judges of that same place. Exceptions to the foregoing: the above does not apply in the case of a man caught in the act of stealing or of public crime (viz. arson, voluntary manslaughter, rape of maidens and matrons, pillaging and despoiling of villages), nor in the case of those, who should be unwilling to honour or pay an outstanding debt, bordering on an excessive or criminal amount” (J. Jędruch, *Constitutions, Elections and Legislatures of Poland, 1493–1993. A Guide in their History*, New York 1998, p. 418).

<sup>12</sup> After the Statute of Nieszawa of 1454, which made the imposition of the taxation and the calling of feudal mass levy depend upon the consent given by local assemblies of gentry (*sejmiki*).

were the bodies that the monarch consulted before making decisions in important matters. Thus, *wiece* or *colloquia* were the proper places for the monarch to adopt statutory rules.<sup>13</sup> Even before the era of privileges, Casimir the Great had introduced something akin to statutory law because, during the sessions of *colloquia*-like assemblies, he issued a kind of codification of the customary law for two provinces: Wielkopolska (*Polonia Maiora*) and Małopolska (*Polonia Minora*). Particularly in case of the latter the monarch tried to produce a nation-wide code of law which incorporated the edicts issued by his predecessors as well as the bulk of the customary law. The entire collection amounted to 150 articles; as a collection of the customary law of Poland, it survived until the fall of the *Respublica* at the end of the eighteenth century.<sup>14</sup>

Originally, the above-mentioned *wiece* or *colloquia* functioned as meetings for the monarch's officers. However, when enlarged by the representatives of the gentry, they tended to turn into *sejmiki* (local assemblies) convened in respective provinces or into a general *sejm* (*Conventio Magna*) for the entire country, thereby laying the foundations for Polish parliamentarism.

Without the consent of the *Sejm*, the monarch could not in any fundamental way change the customary law. The *Nihil Novi* Statute, adopted by the *Sejm* of Radom in 1505 *expressis verbis* provided for this right by proclaiming:

Because common laws and public ordinances affect not one, but all people in common, therefore, at this Sejm of Radom, with all the judges, councilors, barons, and territorial deputies assembled together, we have reasonably moved and, further, adopted, the following equitable resolution: that, because such might become a detriment and injury to the State, an injury and misfortune of whatever sort to the private individual, and make for change in regard to public right and liberty, henceforth, and in future times in perpetuity, no new laws shall be made by us or our successors, without the consent of the councilors and territorial deputies.<sup>15</sup>

Generally speaking, in those days statutes introducing absolute novelties were rare. It was believed that statutes should be reflective of the already existing customary norms.

#### 4. The custom vs. statute

Throughout the entire fifteenth century customs prevailed in the land law.<sup>16</sup> In the sixteenth century there were attempts to replace the custom as described by lawyers in their books of authority with a codified land law system. The *Łaski's Statute* of 1506 was reflective of this tendency; Łaski, being the king's chancellor, chronologically arranged royal statutes. The Statute also included two small collections of customary law as mentioned above, as it was meant to be *consuetudines in scriptis redactae*. A clause included

<sup>13</sup> W. A. Maciejowski, *Historya...*, pp. 221–223.

<sup>14</sup> W. Uruszczak, *Próba...*, pp. 19–21; *idem*, *Zwyczaj a ustawa w staropolskiej myśli prawniczej* [in:] *Z historii państwa, prawa, miast i polonii. Prace ofiarowane profesorowi Władysławowi Ćwikowi w 40-lecie jego pracy naukowej*, eds. J. Ciągwa, T. Opas, Rzeszów 1998, p. 264.

<sup>15</sup> J. Jędruch, *Constitutions...*, p. 418; W. Uruszczak, *Zwyczaj...*, pp. 264–265.

<sup>16</sup> W. Uruszczak, *Próba...*, p. 24.

in the *Łaski's Statute* encouraged respective *ziemie* (regions) and voivodeships<sup>17</sup> to produce written compilations of customary law. The compilations were expected to obtain binding force upon their approval by the monarch. However, despite these efforts, only a fragment of early sixteenth century custom was adopted in the *Formula Processus*, which was a codification of the major steps of procedure applied before the court of law.

What demands our attention is the relationship between statutory and customary norms. The statute frequently performed a complementary role *vis-à-vis* the custom and supplemented the principles contained therein. In some cases, however, the statutory law would contradict older practice and tradition, thereby introducing new norms. Yet, in general, attempts to expand statutory devices in the *niveau* of the court-applied law were made too late (i.e. at the time when customary law had already been sufficiently consolidated). Therefore these statutory *iurae novae* were viewed with a lot of suspicion, leading to the ultimate failure of codification projects (Taszycki's case being a good example<sup>18</sup>). When in the sixteenth century regular parliaments (*Sejms*) began to fully function, the old *ius ducale*, which at one time allowed the monarch to intervene in the substance of the customary law, no longer existed.

Customary law could be changed only by a parliamentary action, but the noble class, which fully controlled *Sejm* activities and which obtained self-government of a high degree, showed no intention of really intervening in the custom. In the eyes of the nobles, such an intervention might challenge the legal system and strengthen royal power. Therefore, *Sejm* statutes (traditionally referred to as *constitutiones*) hardly ever modified anything in the area of law. Rather, they focused on developing the political rights of the noble estate, thereby securing their ever-growing share in the government of the country.<sup>19</sup>

These tendencies contradicted those detectable in the discussed projects of codifications, which tried to smuggle the idea that the customs which contradicted the written norms contained therein should be considered non-binding. As has already been said, these codification attempts ended mostly in failure.

Up until the mid-sixteenth century, jurists considered customary law to be of an auxiliary nature only *vis-à-vis* the statutes. Thus, according to Jan Cervus Tucholczyk, the role that should be attributed to the custom was supplementary in character. In addition, Jan Kirstein Cerasimus, who mostly dealt with the law applied in towns, believed that the binding force of the custom depended on its compliance with the written law. In his opinion, however, once the custom was formulated in writing its significance was tantamount to that of the statutory law. On the other hand, Andrzej Frycz Modrzewski thought that only the *leges* or statutes ranked as high as binding norms and the *mores* could be the sources for the formation of statutes.

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<sup>17</sup> *Ziemie* and voivodeships were the provinces into which Poland was divided; their size and location depended on their history. In these provinces, there were summoned local assemblies of the nobility (*sejmiki*), and local dignitaries such as *voivodes* and castellans held their posts.

<sup>18</sup> Mikołaj Taszycki was the author of the codification project of the entire customary law called *Correctura Iurium* of 1532. *Correctura* imposed on the courts the obligation of applying its norms *per analogiam* in cases unforeseen by it. It also forbade the application of the customary norms which were in contradiction to the norms of *Correctura*. This meant that after 1532 the customary law was supposed to lose its binding force when discordant with the codified law. The *Sejm* of 1534 rejected *Correctura Iurium* because it was considered to be *iura nova*. W. Uruszczak, *Zwyczaj...*, pp. 265–269.

<sup>19</sup> O. Balzer, *Uwagi...*, pp. 186–189.

The views of theoreticians were not reflected in court practice. The anonymously written *Puncta in iudiciis terrestribus et castrensibus observanda* of 1544 rejected the opinions of sophisticated legal writers. Instead, the author of the *Puncta* regarded customary norms as autonomous sources of law, functioning side by side with the statutes and requiring no approval of state authorities.

From the mid-sixteenth century, the legislative nature of customary norms ceased to be questioned. Customary law functioned autonomously and had binding force. Jakub Przyłuski, the author of *Leges seu statuta ac privilegia Regni Poloniae omnia* (Cracow, 1553) and the most eminent legal theoretician of pre-partition Poland, admitted the possibility that statutory norm could be derogated by the customary one. However, he insisted that the winning custom could not be absurd, and – in case it contradicted the statutory norm – it had to demonstrate a forty-year applicability to override the statute. Jakub Przyłuski produced the compendium of the Polish customary law later adopted by Jan Herburt in his *Statutes*. This compendium of customary law was applicable side by side with the statutory law. What is symptomatic is that these two authors did not insist on the customary norms being in any way approved by state authorities. This opinion was shared by a number of outstanding lawyers such as Bartłomiej Groicki, Andrzej Lipski, Tomasz Drezner, etc. Furthermore, Mikołaj Zalasowski, a seventeenth century eminent jurist, by no means called into question the normative nature and the binding force of the custom.<sup>20</sup> In the following parts of the present paper, Mikołaj Zalasowski's work is mentioned several times as an example of the Old-Polish jurisprudence.<sup>21</sup>

## 5. Examples of the coexistence of the custom and statute in Poland

To better understand the subtle relationship between customary norms and statutory laws in old Poland it is advisable to analyze those institutions whose final shape was perpetuated by the statute but whose entire historical evolution was developed by the customary norm. These institutions are classified in private, penal, and procedural lines of law. It is worthwhile to note that until the eighteenth century the land law system (i.e. the system applicable to the nobility) did not differentiate sharply between the civil and penal branches of law. This had something to do with the significant role the Polish legal system attributed to pecuniary tariff-provided penalties. A Polish nobleman could therefore

<sup>20</sup> W. Uruszczak, *Zwyczaj...*, pp. 269–277.

<sup>21</sup> He formulated a definition of the custom and the customary laws which he classified as general, special, and local ones. He described the difference between the custom (*stylus, observantia*) and the customary law (*consuetudo*). The former could be binding only to particular parties of a trial. He introduced several conditions which had to be fulfilled by the customary norm to have the force of law: 1) the silent consent of the society (*tacitus consensus populi*) which should be characterized by *animo introducendi consuetudinem*; 2) a rational goal (*rationalibus consuetudinibus*), i.e. the compliance of the custom with morality; 3) a lapse of time (*praescriptio consuetudinis competenti tempore*): from 10 to even 100 years; 4) the application of the custom (*frequentia actuum*). I. Malinowska, Mikołaj Zalasowski. *Polski prawnik XVII stulecia na tle ówczesnej nauki prawa*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Rozprawy i Studia” 1960, vol. 21, pp. 297–298.



escape punishment from a remarkable number of common offences.<sup>22</sup> However, in some cases, the payment of wergild or discretionary damages was considered insufficient, and the wrongdoer had to suffer a state-imposed public penalty. The culprit was then subject to a statutorily imposed public law regime as opposed to a private law regime regulated by customary law.

As a whole, throughout the entire history of the Commonwealth, priority was given to customary law. Only scarce, *Sejm*-adopted statutory acts could intervene in private social relationships. The rest was governed by the customary system. Statutory law was expected to integrate what had already been worked out in the customary system. Thus, the fourteenth-century Statutes of Casimir the Great did not fundamentally differ from customary law. They only testified to that part of customary law which previously had not existed in recorded form. Only rarely were some novelties, deliberately intended to be introduced by the monarch, introduced in the statutes. In regard to the *Sejm*-adopted statutes of a later era, often they only recorded laws that had been developed through generations of practice. Thus, they were not in abstract nature but fully integrated with long-lasting institutions. In other words, the parliament-adopted statutes were solutions to certain social demands.

## 6. The institutions of the private law

Two Old-Polish institutions – life annuity between husband and wife and the securing of a loan by mortgage – were those which, in their development, followed the above outlined path. Spouses' annuity was classified as an institution of the matrimonial property law, and at the same time it functioned as a method of *mortis causa* (or the disposal of property by an individual). The institution was exponent of the particularly strong position of a noblewoman, and above all a widowed noblewoman, in the area of the land property law. Her capacity to perform acts in law was larger than that enjoyed by women in Western Europe. Upon the death of her husband, the surviving wife acquired the right to independently use and dispose of her dowry. She also continued to use her husband's property and estate, which during her marriage garnered a separate status.<sup>23</sup> In addition, these rights extended until her death or remarriage. The Statutes of Casimir the Great limited these rights: according to these Statutes, if the surviving wife had adult sons, she was entitled only to her trousseau, her dowry, and the donations left to her by the deceased, but she had to give up the estate to the inheritors. However, despite this statutory provision, in practice the widow continued to run the administration of the entire estate left by her husband. The monarch intervened against this *contra legem* practice which proved the powerful role of the custom. In the 1423 Statute of Warta the king while repeating the previous statutory prohibition, tried to ease the earlier regime imposed by Casimir the Great. In the statute the widow was granted an additional right to keep a part of the domestic chattel upon the death of her husband.

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<sup>22</sup> S. Płaza, *Historia prawa w Polsce na tle porównawczym*, vol. 1, Kraków 1997, pp. 337–338.

<sup>23</sup> *Ibidem*, p. 254.

Nevertheless, the discussed clash between the powerful customary law and the monarch shows that the amendments introduced into the custom by the statutory law were not always effective since they could be rejected by the gentry acquainted with the long-cultivated customary norms. Given these events, the king had to search for some kind of compromise. The aforementioned annuity was that very compromise, which was worked out by jurisprudence and court decisions in order to replace the statutorily prohibited custom according to which the windowed noblewoman could not retain the entire estate left by her husband. The annuity was tantamount to the legacy made by the husband as early as the drafting of the antenuptial agreement. Such agreements were regularly entered into a court-conducted register like other agreements concerning landed properties.<sup>24</sup> In this particular agreement the husband promised – in the event of his spouse's widowhood – to grant her the rights to use the entire estate left by him, although without giving her the right to sell it or to encumber it with debts. On the other hand, he authorized her to lease it until her death or remarriage. From the sixteenth century on, mutual legacies of that type became so common that the templates of contractual provisions may be found in *Formula Processus* of 1523. This practice obviously limited the rights of inheritors, who frequently were fully mature sons of the deceased. Therefore, the seventeenth- and eighteenth-century jurisprudence and the resolutions of local *sejmiki* tried to combat the customary law in this respect. They were however unsuccessful, making it clear that despite having some negative aspects, the wife-and-husband annuity, reflective of the customary norms, showed a particular resistance to any attempt of statutory amendment of this form.<sup>25</sup>

Mikołaj Zalasowski, an old-time jurist who was mentioned previously, devoted to the annuity (*mutua advitalitas*), a separate chapter in his *Ius Regni Poloniae*.<sup>26</sup> According to what he had written, the spouses could mutually make legacies to the benefit of each other. These legacies referred to their landed estates and were expected to benefit the spouse that survived. Additionally, Zalasowski provided formulas of such legacies as applied in the Kingdom of Poland (referred to as the “Crown”) and in Royal Prussia. The scope of annuity was large; the spouses could entitle each other to their entire property comprising both the real estate and the movables. According to Zalasowski, the annuity could not be instituted while accompanied by any condition which might encumber the inheritor. The annuity was valid until the widow remarried, which was advantageous to the inheritors. In addition, the widowed female annuitant (*domina advitalis*) had the right to use the estate in question although without any right to alienate it. Zalasowski informed about the controversy among lawyers on whether the annuitant could lease the estate which they inherited as a result of this contract. He also emphasized that the husband could not, without the consent of his wife, sell the estate upon which the annuity was instituted.

Let us now focus for a while on the Old-Polish law on land registry. Its development was originally bound to the emergence of court books with their function of recording transactions concerning real estate.<sup>27</sup> What is important is the fact that, practically from the beginning of Poland's statehood, a particular regime and form were required with

<sup>24</sup> On the antenuptial agreements see: *ibidem*, p. 241.

<sup>25</sup> *Ibidem*, pp. 245–246.

<sup>26</sup> See: I. Malinowska, *Mikołaj Zalasowski...*, p. 214.

<sup>27</sup> See: S. Płaza, *Historia...*, vol. 1, pp. 111, 144.

respect to the contracts that referred to landed estates, especially if the subject matter of these contracts was the alienation or the encumbering of these estates. In the remote past the witness of such transactions was the *opole*<sup>28</sup> or the local community whose business was to testify that the contract in question was in fact concluded and legal. Beginning in the thirteenth century, the ownership of the real estate was conveyed in the presence of the prince who, on that occasion, issued the document testifying to the alienation. From the mid-fourteenth century, contracts of that type were entered into a register by the parties before the land court (whose major competence was pertaining exactly to the control of land transactions). The court registered the contract in the records or books that this court kept and on the occasion of such a transaction issued an official copy, which functioned as proof of the concluded contract. And the entry to the aforementioned book of inscriptions was of constitutive, viz. the legislative nature.<sup>29</sup>

The emergence of court books or records and their increasing significance for the transactions concerning the alienation of real estates was accompanied by economic development and the nobility's growing interest in various forms of credit. In the late fourteenth century, this led to the appearance of such a form of pledge or lien that was advantageous and convenient for the nobles. And specifically, while concluding long-term loan contracts, which were indispensable for continuing the economic activities, they resorted to the easiest method of securing the credit that was offered to them. The method consisted in the pledging of their land estates in such a way that the latter were not transferred to the creditor's holding. This type of pledge – which amounted to a regular mortgage – was developing throughout the fifteenth and sixteenth centuries. Its developmental line was based on practice and custom that satisfied social demand.

The ever-growing popularity of the custom-based mortgage inspired the *Sejm* to adopt the law that would provide precise regulation for what had already been customarily outlined in 1588. The *sejm*-adopted statute on mortgage fully complied with what had already developed. The statute provided that the creditor's claim arising from the contract between him and the estate owner be secured on the estates of the debtor. What was indispensable for the contract to be valid was the entry that had to be made into the *ziemski* (land) court's or *grodzki* (castle) court's book, which informed about the land estate being encumbered. The interested party had to apply for the entry to this court in whose region the encumbered estate was situated. The sixteenth-century Polish mortgage law was based on the following principles: 1) priority of entries (*prior tempore potior iure*, the one whose entry was earlier had better right to satisfy his claim), 2) free access to the land and mortgage register, 3) detailed assigning of the credit which was given to the specific portion of estate (in order to facilitate the potential satisfying the claim), 4) reliability of the land and mortgage register.

In his description of the Polish law, Żalaszowski also described the law on mortgage. He tried to differentiate between several types of mortgage, specifically the contractual real estate mortgage and one that was tantamount to statutory lien. He also differentiated between the detailed and general mortgages. What he emphasized was the aforemen-

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<sup>28</sup> It was a local commune which functioned in the early Middle Ages; it possessed some rights to its members. At the same time there were certain duties imposed on *opole* by the state authorities, e.g. the prosecution of a wrongdoer when a crime was committed on its territory.

<sup>29</sup> S. Plaza, *Historia...*, vol. 1, pp. 283–284.

tioned principle of priority of official entries as applicable in the Polish law. In addition, his treaty also contains the mortgage contract formulas as applied in the territory of the Crown and Royal Prussia.<sup>30</sup>

The principles laid down on land registry by the Old-Polish law made this law, by the European standards at the time, a particularly innovative one. The only drawback of the Old-Polish land registry was the lack of a separate land and mortgage book organized for each real estate. On the other hand, the encumbering contracts as well as other contracts concerning estate were chronologically entered into books kept by the courts. This provided a certain difficulty in using the principle of free access to land and mortgage register records but did not make its execution impossible and did not challenge other principles that governed the law on land registry. As previously emphasized, despite certain novelties introduced in the 1588 *Sejm*-adopted law, it legitimized a two-century long customary practice. While the usage seemed a bit insufficient by the end of the sixteenth century, ironically it was precisely the need to secure transactions concerning real property that created the demand for a statutory regulation.<sup>31</sup>

The examples of discussed Old-Polish private law institutions demonstrated a general tendency, according to which the major sources of the private law institutions were customary norms generated by the need to satisfy social demand. When such norms were not fully compliant with the monarch's interest or his feeling of what the law should be, he tried to intervene and introduce innovative solutions. As could be observed, he was not always successful. One may say that even when the *Sejm*-introduced statutory law began to develop more dynamically, the total liquidation of customary law was out of the question. The custom could thus continue even though its functioning was something *contra legem*.

The situation was slightly different when the law-producing state organ, while tolerating the prevalent customary norms, intended only to provide statutory sanction in order to secure a higher reliability of legal transactions. This was the case of the 1588 *sejm*-adopted law on land registry, which, for that reason, was met with social approval. It indeed filled certain gaps characteristic of customary norms and consequently raised the latter to the status of clear and reliable written law.

## 7. The institutions of the penal law

The previously described tendency is particularly visible in the penal law of the past, homicide being a very good example. Homicide was originally classified among the private law offences thereby leaving it up to the family of the victim to decide whether to institute the prosecution for the killing of one of its members. It was a custom that was sanctified by a tradition that dated back to the tribal era and kinship organization, and in which the reaction of the victim's family bore some traits of a ritual. In the remote past, the penalty for murder was inflicted on the wrongdoer by the victim's kindred. The activities of the victim's kinsmen were tantamount to vendetta which, at one time,

<sup>30</sup> I. Malinowska, *Mikolaj...*, pp. 227–229.

<sup>31</sup> S. Plaza, *Historia...*, vol. 1, pp. 289–290.

was limited neither by temporal nor territorial factors. Likewise, it was not restricted to specific individuals since all the members of the wrongdoer's family could be affected by it. It was only in the fifteenth century that *Sejm*-adopted laws tried to provide some regulations for vendetta and limit its scope. In 1421, a twenty-year time limitation was introduced *vis-à-vis* the vendetta. After the expiry of this time limit, it was no longer possible to institute the vendetta. Furthermore, the infliction of vengeance for certain homicides (for instance for killing the one who kidnapped a woman) was also prohibited. Likewise, a special procedure, which required that the desire of the injured party to inflict a vengeance on the wrongdoer be first communicated to the latter, was introduced. In other words, various attempts were made to prohibit vendetta but the strength of the customary norm in this respect was so powerful that the statutory provisions restricting it were not observed. One of the *Sejm*-adopted laws that tried to derogate vendetta was the statute on homicide of 1588, which will be further discussed.

Despite the official prohibition, vengeance upon the killer by the kindred of the victim survived among the gentry as a method of bringing the culprit to justice until the end of the eighteenth century. Its survival was facilitated by the diminishing influence of the state in its role as the guarantor of individual safety.<sup>32</sup>

The next stage in the development of the customary norms relating to the liability of the killer was reached with the development of the aforementioned tariff-providing penalty system. In particular, the system clearly demonstrated the lack of sufficient differentiation between the lawlessness of the penal law type and the civil law damage arising from someone's activity. In addition, the pecuniary penalty also involved the compensation for the damage inflicted on and the harm experienced by the killed victim's family. It differed from the mere redress in that the amount of pecuniary penalty was strictly fixed irrespective of the factual injury suffered by the wronged party.<sup>33</sup> The tariff-implying penalty system, which survived in the Polish land law until the eighteenth century,<sup>34</sup> consisted of the possibility to change each penalty that affected the culprit's life or health into a pecuniary penalty on the basis of a motion filed by the culprit. And *vice versa*, if the condemned individual could not afford to pay the pecuniary penalty, it could be turned into a punishment that affected life and health.<sup>35</sup> The penalty imposed on the wrongdoer for homicide was referred to as *główszczyzna* in Old-Polish and its amount depended not only on the circumstances in which the crime was committed but also on the social status of both the perpetrator and the victim himself.<sup>36</sup>

The customary law on homicide was supplemented by the construction of the "king's peace" (*mir monarszy*).<sup>37</sup> Some circumstances in which certain private offences were

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<sup>32</sup> In the Western Europe, the phenomenon of vendetta as undertaken by the kinsmen often caused cruel and long-lasting private wars between powerful families. However, taking vengeance began to be limited earlier than in Poland. Especially the Catholic Church introduced a series of devices such as *Treuga Dei* or sanctuary to limit vendettas. Also then the state tried to cope with that problem by issuing *Landfrieden*. For further details see: S. Plaza, *Historia...*, vol. 1, pp. 395–397.

<sup>33</sup> *Ibidem*, p. 397.

<sup>34</sup> In the Western Europe that penalty system deteriorated in the course of the development of the absolute regimes and the triumph of state-imposed public penalties.

<sup>35</sup> S. Plaza, *Historia...*, vol. 1, pp. 397–398.

<sup>36</sup> About the amount of this penalty see: *Ibidem*, pp. 398–399.

<sup>37</sup> *Ibidem*, p. 356.

committed could be converted into the ones classified as those of the public nature and were consequently threatened with more severe public penalties. A conversion of this type might happen if the victims of the offence were certain individuals (e.g. women, clergy), or if the offence was committed in a certain places like highways, churches etc. This variety provided for two kinds of peace referred to as *mir osobowy* ("personal peace") and *mir miejsca* ("location peace"). There existed also *mir mieszany* ("mixed peace") which provided for the protection of both certain individuals and places in which they found themselves (e.g. courts of law). An individual who infringed the *mir* was subject to a more severe liability since, apart from customarily imposed private penalty, a penalty of a public nature was also imposed on him. In the fourteenth and fifteenth century, the principles of killer's liability were modified by the emergence of a new custom whose appearance confirmed the growth of state power. Particularly, apart from being fined with a pecuniary penalty, the culprit was also subject to a public penalty – although the latter assumed the form of a fine paid to the benefit of the monarch or the court.

Only in the sixteenth century did the Polish land law begin to differentiate between what was called criminal and civil type of homicide. The criminal homicide included aggravated murders that were committed intentionally or cases where the existence of an aforethought malice was presumed (this referred to the homicides committed in *Sejm* while its session was held, or those committed at night or with the use of a gun). In such homicides, the perpetrator was subject to a criminal penalty in the form of beheading. Another group of offences included non-intentional homicides that were threatened only with a civil penalty, which amounted to an aggravated form of prison referred to as the "tower". The condemned killer was sentenced to being imprisoned in the tower principally for a year and six weeks. In addition, *glówszczyzna* had to be paid by him. It was precisely Mikołaj Żalasowski who tried to differentiate between the intentional and unintentional homicides and also homicides committed by mere chance.<sup>38</sup>

The customary norm that, at one time, allowed a criminal to redeem himself from penal liability contradicted the interests of the monarch who tried to secure domestic safety. The monarch therefore tried to modify and change the customary law in that respect. He did it through a *Sejm*-adopted law of 1538 that provided for the precise lines along which the two types of tower (*wieża*), the upper tower and the lower tower, were expected to be imposed on the killer. The lower tower was the penalty inflicted on the culprit for the most serious crimes such as intentional homicide. In its severity the lower tower might be equal to the death penalty.<sup>39</sup> The penalty of the upper tower was reserved for perpetrators of less serious crimes.

What is of particular significance in the discussed context is the *Sejm*-adopted law on homicide of 1588. This statute introduced more serious punishments for murder. But above all it prevented the possibility of avoiding liability by the one who killed a nobleman. Before this statute was adopted the perpetrator could escape liability for this kind of homicide if he reconciled with the family of the victim and paid a pecuniary fine. Starting from 1588 and on the perpetrator had to subject himself to public penalty of the "lower tower". However, a special novelty in the discussed 1588 law was the subsidiary

<sup>38</sup> I. Malinowska, *Mikołaj...*, pp. 255–257.

<sup>39</sup> The conditions in which the condemned perpetrator had to live were very severe – very high humidity, low temperatures and hunger caused his slow agony. S. Plaza, *Historia...*, vol. 1, p. 409.

public complaint. Previously, in the case of homicide, each prosecution was instituted on the basis of a complaint filed by the family of the victim. It was this family that had to bear all the burdens connected with the trial such as detention of the perpetrator until the trial and during the court proceeding, collection of evidence, etc. Starting from 1588 if the victim's relatives failed to file a complaint in court, they were subjected to a pecuniary fine amounting in its proportion to *głównoszczyzna*. And in the event that the victim's relatives were missing it was the *starosta*<sup>40</sup> or a state officer who were obligated to replace the family and take up the duties. As can be seen, according to the statutory law, murder, which was the most serious private offence, became a crime that was publicly prosecuted independent from the will of the victim's relatives and was threatened with the public penalty in all cases. The statutory intervention was necessary since customary devices were lagging behind the needs of the safety of the state and society.

What was almost entirely left within the domain of customary law in the Old-Polish law system was the use of defenses, which were understood as arguments, by the defendant who tried to escape the liability for his deed. The defendant tried to reach this goal by raising the claim that what he did was not illegal. Both the statutory law and jurisprudence<sup>41</sup> were far from construing abstract idea of defenses that could be applicable to more than one type of offence. If the law ever made any allusion to the defenses, the latter were always discussed as referring to one specific offence. Generally speaking, the defenses were customary law devices. If the statutory law intervened in what was supposed to be a defense, it mostly did it in order to limit the over mitigation effects of the custom in the land penal law system. This happened in a case of defense referred to by the name of *pocztek*. *Pocztek* was a typical customary law device tolerated by the statutory provisions (e.g. Statutes of Casimir the Great). The customary norm sanctioned that if someone provoked another individual by picking a quarrel with him and thus gave the latter an impulse to ward off blows, the provoked individual was not liable for what he had done. Furthermore, the custom sanctioned that the balance between the proportion of the attack of the provocateur to the method of repelling the attack by the provoked individual did not have to be kept. However, it was required that the victim's reaction must immediately follow the attack.

When the nobility began to exceed the reasonable proportion of *pocztek*, thereby escaping any liability for the homicides they committed, the statutory law intervened. In 1472, it was statutorily provided that the perpetrator could not escape unpunished if he killed a nobleman while drawing on an argument arising from *pocztek*, the latter being however still classified as the factor mitigating the liability.

It is not difficult to guess that the *pocztek* laid down the foundations of modern self-defense, which was accomplished by the limitations imposed on the *pocztek*. In addition, the concept of transgressing the limits of self-defense was later also worked out. Self-defense was expected to be temporarily bound with the attack and retained some

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<sup>40</sup> Local officers appointed in *ziemie* by the monarch, called the "monarch's arm". Their competences were connected with administration and justice. In their castles (*grody*), there were held castle courts of law (*sądy grodzkie*), *inter alia* the criminal courts for nobles. *Ibidem*, p. 358.

<sup>41</sup> An example is Mikołaj Żalaszowski, who in his *Ius Regni Poloniae* makes an allusion to the so-called "homicide of necessity" by which he understands killing a man in self-defence. See: I. Malinowska, *Mikołaj*, p. 255.

proportion of what the attacking individual did. Generally speaking however, the self-defense was discussed through the prism of casuistic approach.<sup>42</sup>

The list of penal law defenses was never exhaustive. Apart from *poczatek* and self-defense, the Old-Polish land law also provided defensive arguments like self-help, reconciliation with the injured party, time-limitation, the killing of a harlot, sometimes even the killing of the debtor by the creditor or the act of killing on the occasion of performing one's official duties or carrying out the order of a superior.<sup>43</sup>

The penal law defenses were hardly ever the subject of the statutes or speculations of jurisprudence. They were customary devices created over many generations. It was also believed it would deprive the judiciary of the possibility to treat the penal law with indispensable elasticity given its very strict regulation. Thus, primarily more weight was placed with the judges who, while interpreting the custom, sometimes excused the culprit of penal liability.

## 8. The institutions of the procedure

As previously mentioned, the statutory law was more successful in one area of procedure, which adopted the 1523 *Formula Processus* by the *Sejm*. The pattern of the trial contained therein was based on customary principles and provided for basically the same proceedings in penal and civil cases. Only in the sixteenth century did the penal trial begin to differ slightly from its civil counterpart since it absorbed certain inquisitional traits. For instance, in it appeared a kind of a public prosecutor referred to by the name of *justycjariusz*.<sup>44</sup> Like the civil trial, penal trial was of accusatory and adversary type. At the very end of the eighteenth century, during the Kościuszko's insurrection of 1794, the rules of Polish penal trial were fully laid down along the lines of the modern adversary pattern.<sup>45</sup>

However, what may be of a particular interest in the context of the developments of the procedure is the Old-Polish possessory trial. This trial was designed to restore the last peaceful possessor of the real property to what he recently possessed despite the fact that this possessor had no title to this property and the fact that his possession of it as adversary.

The differentiation between the holding of the law took place in the private law of Western Europe, which was influenced by Roman law, before it took place in Poland. This differentiation was based on a legal title legal title and that arising from a factual situation which might be adversary but based on a sufficiently long continuance.<sup>46</sup> Uncodified and imprecise, the customary Polish law was far from abstract definitions and subtle differentiations between what was based on a legal title and what was based

<sup>42</sup> S. Plaza, *Historia...*, vol. 1, p. 370.

<sup>43</sup> *Ibidem* pp. 371–372.

<sup>44</sup> This office was created in the fifteenth century. A *justycjariusz* possessed the competence characteristic of the public prosecutor as well as the judge with respect to the offences of public nature. See: *Ibidem*, p. 537.

<sup>45</sup> *Ibidem*, p. 459.

<sup>46</sup> See: *Ibidem*, p. 260; K. Sójka-Zielińska, *Historia prawa*, Warszawa 2003, p. 140.



on facts. On the other hand, the customary law tried to find some remedies to protect the ones who were violently deprived of their land possessions. Unfortunately, the same law admitted that the courts, should allow the defendant to resort to arguments arising from his legal title to the disputed real property (even though such arguments should be the ones that might be raised only in a separate, more complex trial designed to return the realty that slipped away from his hands to the owner) while examining the possessory question in a quick trial.<sup>47</sup>

To improve the situation the king had to intervene. He did it by issuing restitution mandates by means of which he ordered that the last peaceful possessor of the landed property has his status restored as the possessor without the examination of his title to the land. In its imperfect form the possessory trial may be detected in a compilation of customary law of *Ziemia Łęczycka*.<sup>48</sup> Since all these attempts to protect an adversary possessor against violent attacks on his peaceful possession of the land proved unsuccessful, in 1543 the *Sejm* adopted a law whose objective was to lay down the precise rules and purposes of a possessory trial. Those who drafted the law relied on what was already produced by custom as well as on the experience arising from the Roman and Canon norms.<sup>49</sup> Later, this 1543 protection of real property possession was repeatedly amended (e.g. in 1587, 1699, and 1726); the amendments were designed to improve its effectiveness.

This Old-Polish possessory trial adopted an abridged procedural form, which is why it was called *scrutinium*. The individual who was violently deprived of his possession of the real estate was expected to file a complaint against the defendant in a castle court, which he must do within one month from the time of the violent episode. This competence of the castle court was not accidental since this was the court that was supposed to be more dynamic and effective than the land court.<sup>50</sup> When a complaint was filed, the castle court examined whether the complaint was fully fact-supported. And if satisfied that it was, the court restored ownership to the last peaceful possessor without studying the legal titles to the land that the parties involved in the litigation could submit.<sup>51</sup>

It is worthwhile to note that in his *Ius Regni Poloniae*, Mikołaj Żalasowski devoted no space to the question of the possessory protection of landed property, even though he gave sufficiently good definitions of the idea of ownership and possession. He did it while resorting to eminent Polish and Western-European jurists such as Thomas Drezner and Bartolus.<sup>52</sup> His silence is therefore a little surprising and might be due to a simple overlook.

Thus, we can observe that the idea smuggled by the procedural pattern and eventually adopted by the possessory trial, was that the latter was expected to be speedy and

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<sup>47</sup> Initially the trial was held against the so-called illegal possession (*malo ordine possidere*), and it meant that the defendant had to prove that he had a legal title to hold a real property. See: *Ibidem*, p. 113.

<sup>48</sup> S. Plaza, *Historia...*, vol. 1, p. 261.

<sup>49</sup> It was mainly the so-called *actio spoli*, an institution formed by the Canon law (formulated firstly in the pseudo-Isidor's collection) in order to protect a bishop who was violently deprived of his property and office. See: K. Sójka-Zielińska, *Historia...*, p. 141.

<sup>50</sup> The land court (*sąd ziemski*) was held in the provinces (*ziemie*) in Poland and its competence was the private law cases of the nobles, especially with respect to the real property.

<sup>51</sup> S. Plaza, *Historia...*, vol. 1, pp. 261–262.

<sup>52</sup> I. Malinowska, *Mikołaj...*, pp. 147–148.

successful in eliminating the violence that the owner might be tempted to use in order to restore what at one time slipped from his hands. In fact, if the owner violently infringed someone's peaceful possession of the land he had to finally surrender. The only thing that was left for him to do was to file another complaint against the adversary possessor. This would be a complaint in which he would demand that the real property, to which he had a legal title, be restored to him. In such a case it was required that his complaint be filed in a land court that examined his claim according to the so-called *petitorial* trial procedure.

We must frankly admit that despite repeatedly alluding to in the successive statutes, the discussed statute-sponsored regulations were not fully effective and did not lead to the total elimination of acts pertaining to the arbitrary interceptions of court functions by individuals who raised claims to a certain real estate while resorting to factual or legal grounds. They did it by organizing military forays aimed at physically seizing the disputed land. The intensity of such occurrences fell upon the second part of the seventeenth and the first part of the eighteenth century, the time when the paralysis of state agencies became particularly symptomatic. It is interesting to find that such an ancient and primitive custom-supported foray is described in detail in the long national epic *Pan Tadeusz; or the last foray in Lithuania* by an eminent poet Adam Mickiewicz<sup>53</sup>. One way or another, the fact that land law in general tended to limit self-dependent activities of the parties involved in disputes concerning their land, is what deserves attention. Particularly, when such an attempt of the land law was very strongly undermined by the ancient custom of the nobles.

## 9. The situation of the customary law in the nineteenth and the twentieth centuries

As has been already stated, the Polish-Lithuanian Commonwealth lost its sovereignty by being partitioned at the end of the eighteenth century. The partitioning powers, ruled by the Habsburgs, Hohenzollerns, and Romanovs, did not think themselves capable of immediately introducing their own legal systems on to the land of the partitioned organism. Their own law was often still imperfect and not fully codified. Austria was the first to undertake replacing the Old-Polish customary law by her own codified legal institutions. A similar tendency could also be observed under the Prussian partition, where starting from 1794 the *Allgemeines Landrecht für die Preussischen Staaten* was in force. Yet, it was initially treated as only of a subsidiary nature *vis-à-vis* the Polish law. In the Romanov-ruled Russian Empire, in its western (i.e. Polish) *gubernie*, the Polish-Lithuanian law was replaced by the Russian codified law only in 1840. What is interesting, however, is what the central part of Poland experienced. In 1807 Napoleon contributed to the re-emergence of a small fragment of the old Commonwealth that was referred to by the name of the Duchy of Warsaw. It was comprised of provinces that were

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<sup>53</sup> The poem is translated into English by Kenneth Mackenzie; *Adam Mickiewicz, Pan Tadeusz or the Last Foray in Lithuania*, London 1964.

previously absorbed by Prussia during the partition. In the Duchy, in the area of private law the French *Code Civil* was raised to the status of binding law. In the area of penal law the Prussian *Landrecht* remained in force. On the occasion of the Congress of Vienna of 1815, the Duchy of Warsaw became partly formative of the new Russia-controlled but to some extent autonomous Kingdom of Poland, which was also referred to as the Congress Kingdom. It was a tiny organism compared to the Polish-Lithuanian Commonwealth. A group of influential Polish politicians headed by Duke Adam Czartoryski believed that they could persuade the Tsar of Russia, who was also King of Congress Poland, to reintroduce the Old-Polish law, which was mostly based on the customary system, in the Kingdom.<sup>54</sup> The latter would thus replace the French and Prussian codified laws. Their intentions were however left unfulfilled. Nevertheless, the *Sejm* of the Congress Kingdom managed to introduce certain modifications to the French *Code Civil* in the area of land register law. In 1818 and 1825, the *Sejm* did it by re-introducing in this respect the Old-Polish solutions earlier adopted by the 1588 law. It reinstated Old-Polish devices, once deeply rooted in the Polish custom, which were already discussed earlier in this paper. It was emphasized that they successfully secured – by means of mortgage contract recorded in the land register – the credit offered to landowners. In 1825, the French *Code Civil* was also modified in the area of matrimonial law, and also in regard to matrimonial property. The French solutions, which denied the Polish customary and religious traditions, were replaced by the norms more acceptable by the Polish population. As a result, in the Congress Kingdom the matrimony ceased to be a strictly secular contract. It adopted a mixed tint (i.e. secular and religious) while the provisions governing the matrimonial property became modified according to the socio-economic reality of Polish provinces.<sup>55</sup>

In the course of the nineteenth century when Austria, Prussia and Russia consequently adopted codification within various branches of law, their codes were introduced in the respective partition zones. These were the laws which the Polish State inherited after regaining its independence in 1918. The codifying activities, which took place in Poland between 1919 and 1939, were based on the legal systems that existed on the Polish soil before 1914 as well as on new ideas disclosed in the West European legal systems. There was no attempt made to restore the Old-Polish customary law.

In the final section of the present paper it may be interesting to discuss the role of the custom and customary law in the present-day Polish legal system. Today each area of social life is commonly subject to statutory regulation. With this in place, the constant statutory amendments are necessary because they are required by the new development. Despite these statutory efforts, the arrival at a fully exhaustive legal system is impossible. The statutory law cannot predict every situation that may happen in reality and *vis-à-vis* which the statutory norms can prove to be insufficiently flexible. Hence, the state legislator, aware of the imperfectness of the system, used to invoke the “universally accepted” or “acknowledged” custom. The clauses invoking such a custom may be

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<sup>54</sup> H. Grynwaser, *Pisma*, vol. 1 (*Kodeks Napoleona w Polsce. Demokracja szlachecka 1795–1831*), Wrocław 1951, pp. 68–71; J. Kamiński, *Prawo francuskie w Polsce* [in:] *Pamiętnik Historyczno-prawny*, ed. P. Dąbkowski, Lwów 1931, p. 34.

<sup>55</sup> See: S. Plaza, *Historia...*, vol. 2, pp. 33–35; *Historia państwa i prawa Polski*, vol. 3 (*Od rozbiorów do uwłaszczenia*), ed. J. Bardach, Warszawa 1981, pp. 494–505.

found in securities transactions law, in bank law, in building regulations law, law on the copyright and copyright-related rights as well as in the Civil Code.<sup>56</sup> While applying the aforementioned clauses, the judges try to escape defining what the custom is and usually interpret it broadly. The courts seem to fear giving any legal definition of the custom or any formulas on how to understand the custom referred to in the discussed provisions. The clauses including the reference to the custom belong to the so-called general clauses that provide more flexibility to the stiff Polish legal system. One way or another, the general clauses express ideas that are not sufficiently precise and that are subject to varying interpretations depending on the specific context and circumstances. The examples of such ideas include the already mentioned “universally accepted custom,” but also the “principles of community life”, the “principles of exercising due diligence,” etc. While interpreting the general clauses, the courts do not feel obligated to justify their own interpretation of these clauses. Yet, their interpretation may of course be subject to the control exercised by the appellate courts of law if the parties apply to them for such a control. However, so long as the lower court interpretation does not infringe the statutory norms or morality, it is under threat of being deemed erroneous and consequently being changed by the upper instance.

Given the small flexibility in the legal system for Civil law in European countries, exploitation of general clauses allows for rational court decisions that settle a variety of disputes. The general clauses function, above all, in private law. However, they are entirely absent in penal law given that the penal law system is governed by the nineteenth-century formulated humanitarian doctrine that proclaims the certainty of law. According to this doctrine, the penal law has to be precise and must not depend on interpretation that ultimately affects the decision of the judge. But even in the penal law there is some room left for the application of the custom: in the case of defense, arguments are raised by the defendant in order to prove that his act was not unlawful. Until recently certain types of arguments not subject to statutory regulation have survived. Additionally, in the case of these arguments the absence of liability on the part of the defendant is justified by the universally accepted custom. It is exactly this custom that specifically deprives the defendant’s activity of the traits that designate a crime. In order to illustrate this, one may indicate the Polish nation-wide custom according to which unmarried young women used to be splashed with cold water on Easter Monday. Formally such splashing fulfills all the features characteristic of an infringement of personal inviolability, which is formulated as an offence in the Penal Code. Nevertheless, such acts remain unpunished given that they do not demonstrate any traits of illegality according to the universally-accepted custom. As it was previously emphasized, the argument that these acts of splashing are not illegal is not detectable in the statutory law (i.e. in Penal Code). The same may be said about an arbitrary detailed solutions that refers to such a defense as the consent given by the victim for the infringement of their law-protected valuables

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<sup>56</sup> The present-day regulations of Civil Code, which include the general clauses, may be illustrated by the following Articles: “Art. 65. § 1. The declaration of will shall be interpreted in such a way which is required by the circumstances in which the declaration was made, by the principles of community life, and by the accepted customs.”; “Art. 922. § 3. The debts belonging to the inheritance *inter alia* consist of the costs of the decedent’s funeral in the amount appropriate to funeral costs accepted by the local custom (...)” [author’s translation].

(like property, good reputation etc.). The wrongdoer may escape liability for such infringements by resorting to the consent-of-the-victim defense. However, they may do so only in certain circumstances when it is customarily accepted and is in compliance with the opinion of the jurisprudence, but which are hardly regulated by the statute.

The coexistence of the custom and the statute in the Polish legal system is supported by a long-lasting tradition. Even today, the role of the custom is not entirely eliminated despite the fact that much more emphasis is placed on the statutory law.